

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANNAMARIA M, a minor,
by her next friend,
ANTOINETTE M,

No C 03-0101 VRW

ORDER

Plaintiff,

v

NAPA VALLEY UNIFIED SCHOOL
DISTRICT, et al,

Defendants.

Plaintiff Annamaria M, through her mother, Antoinette M, brings this federal civil rights action with supplemental state law claims for relief from defendants' alleged failure to protect plaintiff from the harassment of her school classmates. Plaintiff's second amended complaint (SAC) names as defendants the Napa Valley Unified School District (NVUSD) and David Brown, Ron Goldberg, Karen Chase, Kathleen Kernberger, Kathleen Daugherty and Mary Myers (collectively, the "individual defendants". Doc #21 (SAC). Defendants move to dismiss the SAC pursuant to FRCP

1 12(b)(6).¹ Doc #35 (MTD). In the alternative, defendants move for
2 a more definite statement pursuant to FRCP 12(e). Further,
3 defendants move to strike certain allegations pursuant to FRCP
4 12(f). For reasons discussed below, defendants' motion is GRANTED
5 IN PART and DENIED IN PART.

6
7 I

8 The court accepts the following allegations as true for
9 purposes of defendants' motion:

10 Annamaria was home-schooled until September 2001, when,
11 at Annamaria's request, her parents reluctantly agreed to enroll
12 her in the eighth grade at Redwood Middle School ("Redwood"). SAC
13 ¶¶16-17. Not long thereafter it became apparent that Annamaria was
14 unable to keep up with her classmates academically. Id ¶19. On
15 November 13, 2001, at a "Pupil Study Team Meeting," defendants
16 Daugherty (Redwood's principal), Kernberger, Goldberg, Chase and
17 Myers (all of whom were teachers at Redwood) convinced Annamaria
18 and her parents that Annamaria should be transferred into "special
19 classes" that better suited her academic level and provided more
20 individualized attention. Id ¶¶20-25.

21 The students in Annamaria's new class were unmotivated,
22 inattentive and disruptive. Id ¶¶28-29. They frequently acted out
23 and the teachers just ignored them. Id ¶29. Thus, despite
24 assurances that the classes were "safe" Annamaria had been
25 transferred to a class for "difficult students" with "behavioral

26
27 ¹ The SAC also names as defendants the two alleged harassers,
28 Gerardo M and Oscar S, both minors; they are not parties to the
present motions. All references herein to "defendants" encompass only
NVUSD and the individual defendants but not Gerardo or Oscar.

1 problems." Id ¶¶23, 28, 30.

2 Among the students in Annamaria's new classes were
3 Gerardo M and Oscar S. Within one week of Annamaria's arrival,
4 Gerardo and Oscar began to harass Annamaria sexually. Gerardo and
5 Oscar repeatedly rubbed Annamaria's buttocks with their feet while
6 they made lewd comments such as "you are a slut," "you want to fuck
7 me?," "give me head" and "let me touch your ass." Id ¶¶34-35.
8 They would gesture that they wanted sexual favors from Annamaria
9 by, for example, grabbing their crotches and asking Annamaria to
10 have sex with them. Id ¶¶36-37. The harassing conduct "would
11 occur each and every day" during "almost all class periods" and
12 throughout "the school grounds." Id ¶32. Although the harassing
13 conduct occurred on the school campus generally, the in-class
14 harassment occurred in the classrooms of Mrs Kernberger and Mrs
15 Meyers. Id ¶31.

16 "During the months preceding" January 2001, Annamaria
17 brought Oscar and Gerardo's misconduct to the attention of Mrs
18 Kernberger and Mrs Myers "on several occasions." Id ¶38. Although
19 Mrs Kernberger initially (but "on several occasions") told
20 Annamaria simply to "ignore it," she later moved Annamaria to the
21 front of the class to separate her from Gerardo and Oscar. Id.
22 When Gerardo and Oscar continued to harass Annamaria, Mrs
23 Kernberger began sending them to Principal Daugherty's office. Id
24 ¶39. Similarly, Mrs Myers sent Gerardo and Oscar to Principal
25 Daugherty's office when she observed them harassing Annamaria. Id
26 ¶42. The repeated trips to the principal's office, however, did
27 not curb Gerardo and Oscar's misbehavior. Id ¶¶40, 43.

28 //

1 Antoinette "called the schools repeatedly over several
2 weeks" hoping to stimulate an investigation. Id ¶44. Antoinette
3 was "shuttled from person to person in the schools." Id ¶50.
4 Eventually, Antoinette wrote a letter to "the schools" on January
5 14, 2002, describing the situation. Id ¶46. The harassment took
6 its toll on Annamaria, who lost 22 pounds in two months, became
7 "fearful of school and afraid in general" and attempted suicide on
8 one occasion. Id ¶¶45, 61. At some point, Annamaria stopped going
9 to school because of Gerardo and Oscar. Principal Daugherty called
10 Antoinette, demanded that Annamaria return to school and offered to
11 place Annamaria in another class. Id ¶¶54, 56. On January 16,
12 2002, "the schools" called the police and Gerardo and Oscar were
13 detained. Id ¶59.

II

16 Rule 12(b)(6) motions to dismiss essentially "test
17 whether a cognizable claim has been pleaded in the complaint."
18 Scheid v Fanny Farmer Candy Shops, Inc, 859 F2d 434, 436 (6th Cir
19 1988). Although a plaintiff is not held to a "heightened pleading
20 standard," the plaintiff must provide more than mere "conclusory
21 allegations." Swierkiewicz v Sorema NA, 534 US 506, 515 (2002)
22 (rejecting heightened pleading standards); see also Schmier v
23 United States Court of Appeals for the Ninth Circuit, 279 F3d 817,
24 820 (9th Cir 2002) (rejecting conclusory allegations).

25 The court must construe the complaint in the light most
26 favorable to the plaintiff, taking the allegations as true and
27 drawing all reasonable inferences in the plaintiff's favor.
28 Kniesel v ESPN, 393 F3d 1068, 1072 (9th Cir 2005). But "the court

1 [is not] required to accept as true allegations that are merely
2 conclusory, unwarranted deductions of fact, or unreasonable
3 inferences." Sprewell v Golden State Warriors, 266 F3d 979, 988
4 (9th Cir 2001) (citing Clegg v Cult Awareness Network, 18 F3d 752,
5 754-55 (9th Cir 1994)). An action may be dismissed for failure to
6 state a claim only if it "appears beyond a doubt that plaintiff can
7 prove no set of facts in support of his claim which would entitle
8 him to relief." Doe v United States, 419 F3d 1058, 1062 (9th Cir
9 2005).

11 III

12 Title IX

13 Annamaria's first claim alleges sexual discrimination and
14 harassment in violation of Title IX of the Education Amendments of
15 1972, 20 USC § 1681 et seq, which in pertinent part provides: "No
16 person * * * shall, on the basis of sex, be excluded from
17 participation in, be denied the benefits of, or be subjected to
18 discrimination under any education program or activity receiving
19 Federal financial assistance," id § 1681(a).

20 The Supreme Court has held that educational institutions
21 that receive federal funding "may be liable for subjecting their
22 students to discrimination where the recipient is deliberately
23 indifferent to known acts of student-on-student sexual harassment
24 and the harasser is under the school's disciplinary authority."
25 Davis v Monroe County Bd of Educ, 526 US 629, 646-47 (1999). A
26 recipient's liability for peer harassment under Title IX is limited
27 to circumstances where (1) the student is subjected to harassment
28 that is "so severe, pervasive, and objectively offensive that it

1 denies its victims the equal access to education that Title IX is
2 designed to protect," (2) a person with authority to take steps to
3 remedy the harassment has actual notice or knowledge of harassment
4 and (3) that person is deliberately indifferent to the harassment.
5 Id at 652; see also Gebser v Lago Vista Indep Sch Dist, 524 US 274,
6 290 (1998).

7 Although the SAC asserts the Title IX claim against all
8 defendants, Annamaria now concedes that the Title IX claim can be
9 asserted only against NVUSD. Accordingly, Annamaria's first claim
10 is DISMISSED WITH PREJUDICE as to the individual defendants. The
11 court turns to NVUSD's arguments for dismissal.

12
13 A

14 NVUSD first argues that the SAC does not allege that
15 Annamaria was subjected to harassment so severe that it effectively
16 denied her equal access to education. The court is unpersuaded.

17 The SAC alleges that Annamaria was harassed by Oscar and
18 Gerardo throughout "almost all of the school class periods," "each
19 and every day," for a period beginning no earlier than November 13,
20 2001 (the date of the "Pupil Study Team Meeting"), and January 16,
21 2002 (the date that Gerardo and Oscar were detained). It is
22 appropriate to take judicial notice of public schools' adjournment
23 for approximately two weeks during the winter holidays. Thus,
24 drawing all reasonable inferences in Annamaria's favor, the alleged
25 harassment took place for a period of approximately 6-7 weeks. The
26 harassment so affected Annamaria that she lost 22 pounds, dropped
27 out of school and attempted suicide. These are not the "simple
28 acts of teasing and name-calling" that are insufficient to subject

1 a school district to Title IX liability. Davis, 526 US at 652.
2 Annamaria has sufficiently alleged peer harassment of the severity
3 and pervasiveness against which Title IX seeks to protect.

4
5 B

6 NVUSD next argues that Annamaria has not alleged
7 deliberate indifference, but rather that defendants took reasonable
8 measures to curtail Gerardo and Oscar's harassing conduct.

9
10 1

11 As an initial matter, the parties disagree whether
12 teachers' acts or omissions can trigger Title IX liability.
13 Annamaria argues that the inaction of a teacher can give rise to
14 Title IX liability, relying primarily upon Nicole M v Martinez
15 Unified School District, 964 F Supp 1369 (ND Cal 1997).

16 In Nicole M, Judge Patel decided — as a matter of first
17 impression in the Ninth Circuit and in the pre-Gebser/Davis Title
18 IX landscape — that peer harassment is actionable under Title IX.
19 As one basis for her decision, Judge Patel reasoned that a "teacher
20 whose agency status is sufficient to hold the district liable for
21 her harassment of a student * * * stands in no different position
22 when she knows * * * of peer sexual harassment." Id at 1378.
23 Significantly, no teacher was named as a defendant in Nicole M,
24 which relegates this language to the status of *obiter dicta*.

25 Of more fundamental importance, however, Judge Patel's
26 rationale was explicitly based on agency principles. Intervening
27 Supreme Court authority makes clear that Title IX liability cannot
28 be imputed to a school district merely on the basis of agency

1 principles. See Gebser, 524 US at 283; see also Davis, 526 US at
2 640, 642. Rather, Title IX liability can be predicated only upon
3 the acts or omissions of "an official who at a minimum has
4 authority to address the alleged discrimination and to institute
5 corrective measures on the recipient's behalf has actual knowledge
6 of the discrimination." Gebser, 524 US at 290.

7 Unsurprisingly, then, the Eleventh Circuit has recognized
8 that it is "an open question" whether a teacher's deliberate
9 indifference can trigger Title IX liability after Davis. Hawkins v
10 Sarasota County Sch Bd, 322 F3d 1279, 1286 (11th Cir 2003). The
11 Tenth Circuit has opined that when peer harassment occurs on school
12 grounds, "teachers may well possess the requisite control necessary
13 to take corrective action to end the discrimination." Murell v Sch
14 Dist No 1, 186 F3d 1238, 1248 (10th Cir 1999). Still, the Tenth
15 Circuit acknowledged that "[b]ecause officials' roles vary among
16 school districts, deciding who exercises substantial control for
17 the purposes of Title IX liability is necessarily a fact-based
18 inquiry." *Id* at 1247. "In order to answer the question, it would
19 be necessary to examine how [California] law organizes its public
20 schools, the authority and responsibility granted by state law to
21 * * * teachers, the school district's discrimination policies and
22 procedures, and the facts and circumstances of the particular
23 case." Hawkins, 322 F3d at 1286.

24 Although later in these proceedings it might be
25 established that Mrs Kernberger and Mrs Myers lacked authority
26 meaningfully to address Gerardo and Oscar's harassing conduct, the
27 court concludes that, read in the light most favorable to
28 Annamaria, the SAC alleges the teachers had such authority.

Once school officials have actual notice of sexual harassment, they are under a duty to act to curtail the harassment. Davis, 526 US at 652. But this "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary actions." Id at 648. On the contrary, courts should find deliberate indifference "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." Id.

Still, one of the "known circumstances" that must be considered when addressing the reasonableness of the recipient's action is the known effectiveness of the chosen remedial action. "Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." Vance v Spencer County Pub Sch Dist, 231 F3d 253, 260-61 (6th Cir 2000); see also Flores v Morgan Hill Unif Sch Dist, 324 F3d 1130, 1135-36 (9th Cir 2003) (relying upon Vance); Wills v Brown University, 184 F3d 20, 25 (1st Cir 1999) ("If the institution takes timely and reasonable measures to end the harassment, it is not liable under Title IX for prior harassment. Of course, if it learns that its measures have proved inadequate, it may be required to take further steps to avoid new liability." (citation omitted)); Jones v Indiana Area Sch Dist, 397 F Supp 2d 628, 645-46 (WD Pa 2005) (denying summary judgment where the district continued simply "talking to" the perpetrating student long after it became apparent that such action was ineffective).

1 In this regard, the SAC alleges that Gerardo and Oscar
2 were sent to Principal Daugherty's office for the same harassing
3 conduct on multiple occasions. It can thus reasonably be inferred
4 that although Principal Daugherty was aware that whatever she was
5 doing was not working, she nonetheless continued on the same course
6 of action (or inaction) for some time. To be sure, further action
7 (referring the matter to law enforcement) was later taken. But
8 that does not mean any deliberate indifference on her part in the
9 meantime could not give rise to Title IX liability.

3

12 NVUSD contends that the time period during which
13 Annamaria was harassed was simply too short to establish deliberate
14 indifference and that because school authorities eventually called
15 the police, defendants' actions must be deemed reasonable.

16 The relatively short period of time in which the events
17 giving rise to this action took place no doubt bears upon
18 Annamaria's ability to prove a violation of Title IX. First, the
19 harassment must have occurred over a sufficient period of time to
20 be pervasive. Second, after the harassment became pervasive and
21 defendants became aware of it, defendants' ineffective responses
22 must have been repeated over a sufficient period of time that they
23 became clearly unreasonable under the circumstances — assuming
24 those responses were not clearly unreasonable at the outset. But
25 the gestation period for a Title IX violation is shorter when the
26 alleged harassment and ineffective responses occur with relatively
27 high frequency. Here, the SAC alleges that the harassment occurred
28 daily (and throughout each school day) and that ineffective

1 responses were rendered on multiple occasions. Under these
2 circumstances, the court cannot say that it is a legal
3 impossibility that a Title IX violation could have occurred in a
4 period of approximately six or seven weeks.

5 Further, the fact that effective action was eventually
6 taken does not absolve NVUSD of liability for a Title IX violation
7 that occurred in the meantime. Rather, "whether the school's
8 belatedly stepped up efforts were 'too little, too late' is a
9 question [of fact]." Theno v Tonganoxie Unif Sch Dist, 377 F Supp
10 2d 952, 966 (D Kan 2005).

11 The factual record to be developed in this case might
12 show that defendants' actions were not clearly unreasonable. But
13 the court cannot conclude that, construed in the light most
14 favorable to Annamaria, the SAC does not allege deliberate
15 indifference on the part of a school official empowered to take
16 corrective action. NVUSD's motion to dismiss Annamaria's Title IX
17 claim must therefore be DENIED.

18 19 IV

20 *Eleventh Amendment*

21 Before proceeding to the remainder of Annamaria's claims
22 and defendants' arguments for dismissing the same, it is
23 appropriate first to address the effect of the Eleventh Amendment.

24 The Eleventh Amendment bars claims in federal court
25 against non-consenting states and their agencies. Pennhurst State
26 Sch & Hosp v Halderman, 465 US 89, 100-02 (1984). As a school
27 district, NVUSD is a state agency for purposes of the Eleventh
28 Amendment. Belanger v Madera Unif Sch Dist, 963 F2d 248, 250-54

1 (9th Cir 1992). Further, "[t]he Eleventh Amendment bars suits
2 against state officials in their official capacities when" as in
3 this case, "the relief sought is retrospective or compensatory in
4 nature * * *." Han v Department of Justice, 45 F3d 333, 338 (9th
5 Cir 2000). Accordingly, defendants are correct that the Eleventh
6 Amendment bars Annamaria's seventh claim, which arises under 42 USC
7 § 1983, against NVUSD and the individual defendants in their
8 official capacities.

9 Although defendants have not clearly invoked the Eleventh
10 Amendment against Annamaria's state law claims, the court finds it
11 appropriate to address the issue *sua sponte*. See In re Jackson,
12 184 F3d 1046, 1048 (9th Cir 1999) ("Eleventh Amendment sovereign
13 immunity limits the jurisdiction of the federal courts and can be
14 raised by a party at any time during judicial proceedings or by the
15 court *sua sponte*"). The Eleventh Amendment "precludes the
16 adjudication of pendent state law claims against nonconsenting
17 state defendants in federal courts." Cholla Ready Mix, Inc v
18 Civish, 382 F3d 969, 973 (9th Cir 2004). The State of California
19 has not consented to suit in federal court on Annamaria's tort
20 claims. See Riggle v California, 577 F2d 579, 585-86 (9th Cir
21 1978) (holding that the California Tort Claims Act, Cal Gov't Code
22 § 810 et seq, does not "contain a waiver of immunity which extends
23 further than the California state courts"). Nor is the court aware
24 of any enactment or pronouncement whereby the State of California
25 has consented to suit in federal court on Annamaria's claims
26 arising under California statutory law.

27 In sum, because they are barred by the Eleventh
28 Amendment, Annamaria's second through twelfth claims against NVUSD

1 and the individual defendants in their official capacities are
2 DISMISSED. See Cole v Oroville Union High Sch Dist, 228 F3d 1092,
3 1100 n 4 (9th Cir 2000) ("The district court correctly concluded it
4 did not have jurisdiction over the appellant's damage claims
5 against the District and District officials in their official
6 capacities, because California school districts are state agencies
7 and thus immune from damage suits under the Eleventh Amendment.").
8 Such dismissal is WITHOUT PREJUDICE to Annamaria's ability to file
9 in a court of competent jurisdiction. See Freeman v Oakland Unif
10 Sch Dist, 179 F3d 846, 846-47 (9th Cir 1999).

11
12 V

13 *Section 1983*

14 Annamaria's seventh claim arises under 42 USC § 1983 and
15 alleges that defendants deprived Annamaria of (1) her right to be
16 free from gender discrimination in violation of Title IX and the
17 Equal Protection Clause of the Fourteenth Amendment and (2) her
18 right to be free from racial discrimination in violation the Equal
19 Protection Clause. SAC ¶124.

20
21 A

22 The court first briefly addresses defendants' suggestion
23 that a heightened pleading standard applies to Annamaria's claims
24 against them in their individual capacities. The Ninth Circuit has
25 expressly rejected the use of a heightened pleading standard in
26 § 1983 claims. See Galbraith v County of Santa Clara, 307 F3d
27 1119, 1125 (9th Cir 2002) (recognizing that Branch v Tunnel, 937
28 F2d 1382 (9th Cir 1991), was effectively overruled by Crawford-El v

1 Britton, 523 US 574 (1998), and Swierkiewicz v Sorema NA, 534 US
2 506 (2002)).

3
4 B

5 *Gender Discrimination*

6 Annamaria alleges that by allowing a hostile educational
7 environment to develop, the individual defendants deprived
8 Annamaria of her rights under the Fourteenth Amendment and Title IX
9 to be free from gender discrimination. SAC ¶124. The individual
10 defendants assert qualified immunity.

11 Qualified immunity shields state actors from liability
12 for civil damages "insofar as their conduct does not violate
13 clearly established statutory or constitutional rights of which a
14 reasonable person would have known." Harlow v Fitzgerald, 457 US
15 800, 818 (1982). At the pleadings stage, qualified immunity
16 analysis entails three steps. First, the court must determine
17 whether, taken in the light most favorable to the plaintiff, the
18 facts alleged show a violation of the plaintiff's statutory or
19 constitutional rights. Saucier v Katz, 533 US 194, 201 (2001). If
20 a violation has been alleged, the court next determines whether the
21 right infringed was clearly established at the time of the alleged
22 violation. Finally, the court assesses whether it would be clear
23 to a reasonable person in the defendant's position that her conduct
24 was unlawful in the situation she confronted, for even if the
25 defendant violated clearly established law, immunity is nonetheless
26 available if she made a reasonable mistake with regard to what the
27 law requires. *Id* at 202, 205; see also Frederick v Morse, 439 F3d
28 1114, 1123 (9th Cir 2006) (characterizing this final inquiry as a

1 discrete third step in qualified immunity analysis). "This is not
2 to say that an official action is protected by qualified immunity
3 unless the very action in question has previously been held
4 unlawful, but it is to say that in the light of pre-existing law
5 the unlawfulness must be apparent." Hope v Pelzer, 536 US 730, 739
6 (2002) (citing Anderson, 483 US at 640).

7 Accordingly, the court first addresses whether
8 Annamaria's complaint alleges a violation of her rights under Title
9 IX or the Fourteenth Amendment.

10
11 1

12 As an initial matter, the court notes that the Ninth
13 Circuit has expressly declined to address whether school officials
14 and employees can be sued under § 1983 for a violation of Title IX.
15 See Doe v Petaluma City Sch Dist, 54 F3d 1447, 1449 (9th Cir 1995);
16 see also Oona R-S ex rel Kate S v McCaffrey, 143 F3d 473, 475 (9th
17 Cir 1998). Courts in this district, however, have concluded that
18 school officials may be sued under § 1983 for violations of rights
19 protected by Title IX. See Oona R-S ex rel Kate S v Santa Rosa
20 City Schools, 890 F Supp 1452, 1459-62 (ND Cal 1995) (Henderson);
21 Nicole M, 964 F Supp at 1379-81. As defendants have not challenged
22 the viability of Annamaria's § 1983 claim on this basis, the
23 undersigned perceives no need to depart from the well-reasoned
24 conclusions of his colleagues.

25 Further, it is clear that deliberate indifference to peer
26 sexual harassment can violate rights protected by the Equal
27 Protection Clause and enforceable against school officials through
28 § 1983. See Flores, 324 F3d 1135 (recognizing that deliberate

1 indifference permits a conclusion that defendants acted with an
2 unconstitutional state of mind); Murrell, 186 F3d 1238, 1251 n 8
3 ("A state actor's acquiescence in sex discrimination is
4 independently actionable under the Fourteenth Amendment regardless
5 of the dictates of Title IX * * *"); Nicole M, 964 F Supp at 1383
6 ("Particularly in the context of sexual harassment, [a school
7 principal]'s failure to act is significant because it may
8 constitute evidence of her intent to discriminate on the basis of
9 sex.") (citing Bohen v City of East Chicago, 799 F2d 1180, 1190
10 (7th Cir 1986) (Posner concurring) (suggesting that an equal
11 protection claim may be sustained for an employer's complacency
12 toward sexual harassment without a showing of differential
13 treatment because "sexual harassment of men by women is extremely
14 rare")); cf Jackson v Birmingham Bd of Educ, 125 S Ct 1497, 1504
15 (2005) (stating in the Title IX context that "deliberate
16 indifference to sexual harassment of a student by another student
17 squarely constitutes discrimination on the basis of sex").

18 As already discussed, the SAC alleges deliberate
19 indifference on the part of Principal Daugherty sufficient to state
20 a Title IX claim against NVUSD. That conclusion also applies to
21 the § 1983 claim against Principal Daugherty individually.

22 With regard to Mrs Kernberger, Annamaria told Mrs
23 Kernberger that Gerardo and Oscar had touched her inappropriately
24 and asked her if she wanted to "fuck" them, to which Mrs Kernberger
25 responded "on several occasions" by instructing Annamaria to
26 "ignore it." SAC ¶38. In their reply memorandum, defendants
27 attempt to characterize Mrs Kernberger's instruction as a step
28 calculated to end the harassment. See Doc #40 (Reply) at 2. The

1 court disagrees with this characterization. Mrs Kernberger's
2 instruction was, in essence, no action at all. To be sure, the SAC
3 alleges that Mrs Kernberger later moved Annamaria to the front of
4 the classroom and began sending the Gerardo and Oscar to the
5 principal's office. A more developed record might ultimately
6 demonstrate that Mrs Kernberger was not deliberately indifferent in
7 light of all the circumstances. But construed in the light most
8 favorable to Annamaria, the SAC alleges deliberate indifference on
9 the part of Mrs Kernberger.

10 In contrast, the SAC does not allege that Mrs Myers
11 delayed in sending Gerardo and Oscar to Principal Daugherty's
12 office upon being made aware of their conduct toward Annamaria.
13 Thus, the SAC cannot be read to allege that Mrs Myers ever
14 consciously declined to take action when the need for action was
15 indicated. Read in the light most favorable to Annamaria, however,
16 the SAC alleges that Mrs Myers mechanically repeated the step of
17 sending Gerardo and Oscar to the principal's office, even after it
18 would have become apparent that the boys' harassing conduct was
19 continuing unabated.

20 The court is sensitive to the challenges classroom
21 teachers face. Further, teachers' authority to take disciplinary
22 or other direct measures likely to curb persistent peer sexual
23 harassment might be quite limited. But teachers surely have the
24 ability to ensure that school administrators are aware of peer
25 harassment for which schools receiving federal funding are legally
26 accountable. In the normal course, sending harassers such as
27 Gerardo and Oscar to the principal's office could reasonably be
28 expected to communicate the problem to school administrators. But

1 when the circumstances are such that a reasonable teacher would
2 seriously question whether school administrators appreciate the
3 severity of a particular problem, it is incumbent upon that teacher
4 to take additional steps to apprise school administrators of the
5 situation.

6 Again construing the SAC in the light most favorable to
7 Annamaria, the court concludes that the SAC alleges that Mrs Myers
8 failed to take extra steps when their necessity was indicated.

9
10 2

11 "[T]he duty to take reasonable steps to remedy a known
12 hostile environment created by a peer [was] clearly established" in
13 the Ninth Circuit no later than 1998. Oona R-S, 143 F3d at 477
14 (holding "that the defendants [were] not entitled to immunity for
15 their failure to take steps to remedy the hostile environment
16 created by the male students in [plaintiff]'s class").

17
18 3

19 Finally, the court determines whether it would have been
20 clear to a reasonable person in the defendants' position that their
21 acts or omissions violated clearly established law. Because the
22 SAC alleges that Principal Daugherty and Mrs Kernberger initially
23 (but repeatedly) took essentially no action in response known
24 harassment, the court cannot conclude at this juncture that they
25 mistakenly but reasonably believed they were acting within the
26 bounds of the law.

27 Significantly, however, the SAC does not allege inaction
28 on the part of Mrs Myers. In light of all the circumstances, the

1 court concludes that Mrs Myers could have reasonably believed that
2 sending Gerardo and Oscar to the principal's office was an adequate
3 response to Annamaria's complaints. Accordingly, Mrs Myers is
4 entitled to qualified immunity and Annamaria's seventh claim
5 against Mrs Myers is accordingly DISMISSED.

6
7 B

8 *Racial Discrimination*

9 Annamaria argues that her racial discrimination claim is
10 sufficient because she has alleged that she, Gerardo and Oscar are
11 Hispanic while all the individual defendants are Caucasian. Doc
12 #39 (Opp) at 14. Based on these allegations, Annamaria posits that
13 it can be inferred "that the district's lack of adequate response
14 [sic] and tolerance of the sexual harassment is due to racial
15 discrimination, translated 'That's what Mexicans do.'" Id at 15.
16 This will not do.

17 "To state a claim under 42 USC § 1983 for a violation of
18 the Equal Protection Clause of the Fourteenth Amendment, a
19 plaintiff must show that the defendants acted with an intent or
20 purpose to discriminate against the plaintiff based upon membership
21 in a protected class." Barren v Harrington, 152 F3d 1193, 1194
22 (9th Cir 1998). In the usual case, this requires a plaintiff to
23 allege that similarly situated persons who are not in the same
24 protected class as the plaintiff were treated differently. See
25 Ventura Mobile Home Communities Owners Ass'n v City of San Buena
26 Ventura, 371 F3d 1046, 1055 (9th Cir 2004); Lee v City of Los
27 Angeles, 250 F3d 668, 687 (9th Cir 2001); see also Olmstead v L C
28 ex rel Zimring, 527 US 581, 614 (1999) (Kennedy concurring in

1 judgment) (stating that the "normal definition of discrimination"
2 is "differential treatment"); City of Cleburne v Cleburne Living
3 Center, 473 US 432, 439 (1985) (stating that the Equal Protection
4 Clause "is essentially a direction that all persons similarly
5 situated should be treated alike").

6 The allegation that Annamaria is a member of a protected
7 class alone is not sufficient to state a claim of discrimination.
8 See Sherman v Yakahi, 549 F2d 1287, 1291-92 (9th Cir 1977) (holding
9 that the allegation that plaintiff was Jewish and was the only
10 person denied permanent employment was insufficient to state a
11 claim of religious discrimination). Nor are the allegations that
12 Annamaria and the individual defendants are members of different
13 protected groups sufficient. See Thornton v City of St Helens, 425
14 F3d 1158, 1167 (9th Cir 2005) ("[T]he fact that Mrs Thornton is
15 Native American and certain City council members and administrators
16 are not, standing alone, does not mean that Defendants have
17 discriminated on the basis of race."). Finally, the allegations
18 that (1) Annamaria is a member of a protected class, (2) the
19 individual defendants are members of a different class and (3) the
20 individual defendants acted unreasonably do not cumulatively
21 establish either a racially discriminatory intent or differential
22 treatment and thus fail to state an equal protection claim. See
23 Bingham v City of Manhattan Beach, 341 F3d 939, 948-49 (9th Cir
24 2003) (holding that an African-American plaintiff's allegations
25 that he and the Caucasian police officer disagreed about the
26 reasonableness of the traffic stop were insufficient to raise an
27 inference of racial discrimination).

28 //

1 Again, Annamaria has alleged nothing more than that she
2 has a Spanish surname and is Hispanic while the individual
3 defendants are all Caucasian. SAC ¶¶47, 53. In the absence of an
4 allegation that defendants responded more favorably to similar acts
5 of peer harassment directed at students outside the protected group
6 of which Annamaria is a member, discriminatory intent cannot
7 reasonably be inferred from the allegations in the SAC.
8 Annamaria's claim for racial discrimination is therefore DISMISSED.
9 Further, it being clear that Annamaria does not plan to proceed on
10 a theory of disparate treatment, but rather a "That's what Mexicans
11 do" theory unrecognized by the law, such dismissal is WITH
12 PREJUDICE.

13 14 IV

15 *State Law Claims*

16 17 A

18 *Sexual Battery*

19 Annamaria's second claim alleges "sexual
20 battery/harassment." SAC ¶82. To state a claim of sexual battery,
21 a plaintiff must allege that (1) defendant intended to cause
22 "harmful or offensive" contact and (2) plaintiff batteree suffered
23 "sexually offensive contact." Cal Civ Code § 1708.5; see also
24 Angie M v Superior Court, 37 Cal App 4th 1217, 1225 (1995).

25 Defendants argue that dismissal is required in the
26 absence of any allegation that any individual defendant actually
27 touched Annamaria. Annamaria argues that the allegations that
28 defendants breached their duty to protect Annamaria from harms such

1 as sexual battery while she was at school are sufficient to state a
2 claim for sexual battery, relying primarily upon M W v Panama Buena
3 Vista Union Sch Dist, 110 Cal App 4th, 508, 517 (2003).

4 As Annamaria correctly observes, Panama Buena holds that
5 a school district has an "affirmative duty to take all reasonable
6 steps to protect its students." Id. Panama Buena, however, did
7 not approve of liability for sexual assault, but rather for the
8 school's negligent failure to protect the student from a third
9 party's sexual assault. Id at 518.

10 An essential element of sexual battery is that the
11 defendant touched the plaintiff in a "sexually offensive" manner.
12 Annamaria's allegations that the individual defendants breached
13 their duty to prevent Gerardo and Oscar from touching her does not
14 establish that the district defendants sexually battered Annamaria
15 are no substitute. The failure to allege that any of the
16 individual defendants themselves ever touched Annamaria is fatal to
17 a claim of sexual battery. Further, it is clear this deficiency
18 cannot be remedied by amendment. Accordingly, Annamaria's second
19 claim is DISMISSED WITH PREJUDICE.

20
21 B

22 *California Education Code*

23 Annamaria's eleventh claim alleges that NVUSD and the
24 individual defendants failed to discharged their statutory duties
25 under California Education Code §§ 220 and 231.5. Section 220
26 provides that "[n]o person shall be subjected to discrimination on
27 the basis of sex * * * in any program or activity conducted by an
28 educational institution." Section 231.5 provides that "each

1 educational institution in the State of California shall have a
2 written policy on sexual harassment * * * [which] shall be
3 displayed in a prominent location * * * [and] shall be provided as
4 part of any orientation program conduct for new students."

5 Defendants argues that §§ 220 and 231.5 do not provide a
6 private right of action. Doc #35 at 13. NVUSD relies on Nicole M,
7 964 F Supp at 1390. But significantly, Nicole M was decided before
8 California Education Code § 262.4 was enacted in 1998. See Stats
9 1998, c 914 (AB 499) § 38.

10 Section 262.4 provides: "This chapter may be enforced
11 through a civil action." Other courts have concluded that § 262.4
12 affords a private right of action under California Education Code
13 without any requirement that administrative remedies be exhausted.
14 See C N v Wolf, 410 F Supp 2d 894, 903-04 (CD Cal 2005) (declining
15 to follow Nicole M and holding that § 262.4 "explicitly" provides a
16 private right of action under the California Education Code). For
17 the reasons that follow, the undersigned disagrees with this
18 interpretation.

19 Section 262.4 is contained in Article 9 of the
20 California Education Code, which encompasses Education Code §§
21 260-262.4. When read in conjunction with § 262.3, the language of
22 § 262.4 becomes ambiguous. Section 262.3(c) states that "[n]othing
23 in this chapter shall be construed to require an exhaustion of the
24 administrative complaint process before civil law remedies may be
25 pursued." Next, § 262.3(d) declares that "[n]otwithstanding any
26 other provision of law, a person who alleges that * * * she is a
27 victim of discrimination may not seek civil remedies pursuant to
28 this section until at least 60 days have elapsed from the filing of

1 an appeal to the State Department of Education * * *." Although
2 there is some tension between subsections (c) and (d) of § 262.3
3 inasmuch as the former explicitly eschews exhaustion of
4 administrative remedies as a prerequisite to judicial remedies and
5 the latter explicitly requires parties to pursue administrative
6 remedies, this ambiguity is reconcilable: Although parties need
7 not exhaust the administrative complaint process, they must at
8 least pursue administrative remedies to the point of having filed
9 an appeal with the California Department of Education and waiting
10 60 days. But the following textual wrinkle is not so easy to
11 straighten out: Although on its face the statute requires parties
12 to pursue administrative remedies only before seeking civil
13 remedies pursuant to § 262.3, it is § 262.4, not § 262.3, that
14 authorizes civil remedies.

15 A letter of legislative intent authored by the sponsor of
16 Assembly Bill 499, which amended § 262.3 and added § 262.4,
17 resolves this ambiguity:

18 Prior to the passage of AB 499 (1997-98), the
19 Education Code's prohibition of discrimination
20 against students was enforceable through a civil
21 action for legal and equitable relief. It was the
22 legislature's express intent in enacting AB 499 to
23 limit that private right of action under the
24 Education Code, by requiring students to go through
25 an administrative grievance process prior to the
26 pursuit of civil remedies other than injunctive
27 relief.

24 Letter from Assembly Member Keul (April 6, 1999) (published in the
25 Assembly Daily Journal, 1998-1999 Regular Session, at 1381).

26 Generally, California courts do not consider the motive
27 or understanding of individual legislators when construing the
28 meaning of a statute. Roberts v City of Palmdale, 5 Cal 4th 363,

377 (1993). A letter of intent, however, can be considered where it evidences more than "merely the personal view of the proponent of the bill." *Id*; see also In re Marriage of Bouquet, 16 Cal 3d 583, 589 (1976). Such is the case here because a motion to print a letter in the Assembly Daily Journal "shall require a majority vote." Assembly Rule 42(c), available at http://www.leginfo.ca.gov/rules/assembly_rules.html.

Accordingly, the court concludes that § 262.4 must be read with the limitations detailed in § 262.3 such that aggrieved parties may not pursue claims for damages in court "until at least 60 days have elapsed from the filing of an appeal to the State Department of Education." The SAC alleges that Annamaria "has complied with the applicable tort claims statutes by filing government tort claims with" NVUSD, which were rejected on July 15, 2002. SAC ¶62. Because Annamaria has not pursued her administrative remedies to the point required by § 262.3(d), the court concludes that it lacks subject matter jurisdiction over her claim under the California Education Code. Accordingly, Annamaria's eleventh claim is DISMISSED.

C

Unruh Civil Rights Act

Annamaria's twelfth claim alleges that NVUSD violated the Unruh Civil Rights Act (the "Unruh Act"), Cal Civ Code § 51 et seq. Section 51 provides: "All persons * * * no matter what their sex * * * are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Section 51.5 provides:

1 "No business establishment of any kind whatsoever shall
2 discriminate against * * * any person in this state * * * on
3 account of" sex.² Section 52(a) makes the foregoing statutory
4 rights enforceable through a civil action.

5 As an initial matter, it appears that California courts
6 have yet to address specifically whether a school district is a
7 "business establishment" within the meaning of the Unruh Act. But
8 see Ibister v Boys' Club of Santa Cruz, Inc, 40 Cal 3d 72, 79
9 (1985) (discussing the original version of the bill that became the
10 Unruh Act, which included "schools" within its scope, and
11 concluding that the California legislature intended to include all
12 groups enumerated in the original bill). Several federal courts
13 have concluded that public schools are "business establishments"
14 within the meaning of the Unruh Act. See Nicole M, 964 F Supp at
15 1388; Doe v Petaluma City Sch Dist, 830 F Supp 1560, 1581-82 (ND
16 Cal 1993); Sullivan v Vallejo City Unif Sch Dist, 731 F Supp 947,
17 952 (ED Cal 1990). Defendants do not argue the contrary here.

18 Rather, defendants argue that sexual harassment is not
19 actionable under the Unruh Act, relying exclusively upon Brown v
20 Smith, 55 Cal App 4th 767 (1997). The Unruh Act claim in Brown
21 arose from repeated, offensive sexual advances toward the plaintiff
22 by her landlord. Plaintiff postulated "that the sexual harassment
23

24 ² The Unruh Act consists only of § 51. See Stamps v Superior
25 Court, 136 Cal App 4th 1441, 1449-52 (2006); Alch v Superior Court,
26 122 Cal App 4th 339, 395 (2004); Gatto v County of Sonoma, 98 Cal App
27 4th 744, 757-58 (2002). Thus, § 51.5 is not technically part of the
28 Unruh Act. But both provisions are enforceable through § 52(a) and
any distinction between the two sections is not implicated by the
present motion. "To avoid any confusion, all references to the Unruh
Act in this opinion mean California Civil Code § 51." Goldman v
Standard Ins Co, 341 F3d 1023, 1027 n 4 (9th Cir 2003).

1 * * * she endured amounted to denial of ongoing access to her
2 housing accommodations on the basis of her sex, since she was
3 deprived of the quiet enjoyment of her home." Id at 786. In the
4 court's view, however, plaintiff had "effectively alleged an
5 intentional tort in the guise of a statutory [Unruh Act] cause of
6 action." Id at 787. The court was guided by the California
7 Supreme Court's recognition that the California legislature
8 intended the Unruh Act to encompass only the categories of
9 discrimination enumerated therein and admonition that expansion of
10 those categories should be consistent with that intent. See id
11 (relying upon Harris v Capital Growth Investors XIV, 52 Cal 3d 1142
12 (1991) (holding that the Unruh Act does not encompass economic
13 discrimination and discrimination based on a theory of disparate
14 impact)). The Brown court concluded that "expand[ing] the
15 protected categories in the [Unruh] Act to include victims of
16 sexual harassment" would be inconsistent with legislative intent.

17 The court's conclusion was reinforced by California Civil
18 Code § 51.9, which imposes liability for sexual harassment in
19 business, service and professional relationships, and which the
20 California legislature understood as creating a cause of action
21 where none existed before. Id at 787-88. At the time of the Brown
22 decision, § 51.9 implicitly defined "sexual harassment" as "sexual
23 advances, solicitations, sexual requests, or demands for sexual
24 compliance * * * that [are] unwelcome and persistent or severe."
25 See Cal Civ Code § 51.9(a)(2).

26 Given the facts of the case and the court's reliance upon
27 § 51.9, Brown stands for nothing more than the proposition that
28 sexual harassment in the form of unwanted sexual advances are not

1 actionable under the Unruh Act. If the SAC had alleged that
2 defendants themselves had harassed Annamaria with unwelcome sexual
3 comments or conduct, defendants' reliance upon Brown would be
4 better placed. But defendants are not alleged to have engaged in
5 sexual harassment; rather, the court construes Annamaria's Unruh
6 Act claim to allege that defendants' "inadequate response to
7 complaints of sexual harassment," Nicole M, 964 F Supp at 1389,
8 constituted intentional discrimination on the basis of sex. Brown
9 is thus distinguishable and therefore does not control.

10 Defendants have not presented any other argument why the
11 court should not follow the lead of other federal courts that have
12 found a cognizable Unruh Act claim on similar allegations, see
13 Nicole M, 964 F Supp at 1388-89; Davison ex rel Sims v Santa
14 Barbara High Sch Dist, 48 F Supp 2d 1225, 1232-33 (CD Cal 1998)
15 (following Nicole M). Accordingly, the individual defendants'
16 motion to dismiss Annamaria's twelfth claim is DENIED.

17
18 D

19 *Negligence Claims*

20 Annamaria asserts an assortment of claims sounding in
21 negligence: failure to protect (third claim), negligent
22 supervision (fourth claim), negligent placement (fifth claim),
23 negligent failure to protect (sixth claim), general negligence
24 (ninth claim) and negligent infliction of emotional distress (tenth
25 claim).

26 Defendants present several arguments for dismissing the
27 negligence-based claims: First, defendants contend they cannot be
28 liable in negligence absent a statutory basis. Next, defendants

1 contend they are entitled to governmental immunity because they
2 were performing discretionary functions. Further, defendants
3 appear to deny the existence of any duty to protect Annamaria from
4 Gerardo and Oscar. Finally, defendants maintain that these claims
5 are duplicative of each other.

6
7 1

8 "[A] public employee is liable for injury caused by his
9 act or omission to the same extent as a private person," Cal Gov't
10 Code § 820, except that "a public employee is not liable for an
11 injury resulting from his act or omission where the act or omission
12 was the result of the exercise of the discretion vested in him [or
13 her], whether or not such discretion is abused," id § 820.2. Thus,
14 the individual defendants can be held liable only for injuries
15 caused by non-discretionary acts of the individual defendants but
16 are immune from suit for acts or omissions within the individual
17 defendants' discretion.

18 To the extent defendants maintain they cannot be liable
19 in tort absent some additional statutory basis, defendants
20 misunderstand the above-quoted provisions of the California Tort
21 Claims Act, Cal Gov't Code § 810 et seq. "Under the California
22 Tort Claims Act, public employees are liable for their torts unless
23 a statute provides otherwise." Barner v Leeds, 24 Cal 4th 676, 682
24 (2000) (citation omitted) (emphasis added). Contrary to
25 defendants' suggestion, then, there is a statutory basis for
26 liability based on common law theories.

27 //

28 //

2

Defendants argue they are immune from suit because the acts or omissions challenged in the SAC were discretionary within the meaning of California Government Code § 820.2.

"[N]ot all acts requiring a public employee to choose among alternatives entail the use of 'discretion' within the meaning of [§ 820.2]." Barner, 24 Cal 4th at 684-85. Rather, "immunity applies only to deliberate and considered policy decisions, in which a 'conscious balancing of risks and advantages took place.'" Caldwell v Montoya, 10 Cal 4th 972, 981 (1995) (quoting Johnson v California, 69 Cal 2d 782, 795 (1968)) (alterations omitted).

a

Principal Daugherty's decision to take a particular (or no) disciplinary action involved the exercise of discretion within the meaning of § 820.2. See Kemmerer v County of Fresno, 200 Cal App 3d 1426, 1437-39 (1988) (holding that county officials' decision to institute disciplinary proceedings against a civil service employee "was a policy decision involving the exercise of discretion" entitling them to immunity under § 820.2); see also Nicole M, 964 F Supp at 1389-90 (relying upon Kemmerer and concluding that "[d]ecisions by a school principal or superintendent to impose discipline on students and conduct investigations of complaints necessarily require the exercise of judgment or choice, and accordingly are discretionary, rather than ministerial, acts"); Petaluma, 830 F Supp at 1583 (relying upon Kemmerer and holding that high school counselor was entitled to

1 immunity based on his alleged failure to respond adequately to
2 known peer sexual harassment). It is not appear that this
3 conclusion, by itself, requires dismissal of any claims against
4 Principal Daugherty. But Principal Daugherty's alleged failure to
5 take disciplinary measures to curb the harassment is clearly one
6 factual predicate for Annamaria's claims. This cannot be a basis
7 for liability under any common law theory in this suit.

8
9 b

10 Annamaria's fifth claim for negligent placement alleges
11 that defendants breached their duty to place Annamaria in an
12 appropriate class. The decision where to place a student new to
13 public education clearly involves the balancing of various
14 considerations such as the student's social needs and academic
15 preparedness. Such balancing necessarily involves the exercise of
16 discretion and, accordingly, cannot be a predicate for liability.
17 Cf Thompson v County of Alameda, 27 Cal 3d 741, 748-49 (1980)
18 (holding that county's selection of a custodian for juvenile
19 offender was a discretionary act within the meaning of § 820.2);
20 Becerra v County of Santa Cruz, 68 Cal App 4th 1450, 1462-64 (1999)
21 (holding that social workers' selection of a foster home for a
22 dependent child was a discretionary decision within meaning of
23 § 820.2); Ronald S v County of San Diego, 16 Cal App 4th 887, 897
24 (1993) ("The nature of the investigation to be conducted and the
25 ultimate determination of suitability of adoptive parents bear the
26 hallmarks of uniquely discretionary activity.").

27 Similarly, to the extent Annamaria's fifth claim purports
28 to predicate liability on the decision to entrust Mrs Kernberger

1 with a classroom that she was allegedly "unable to control," SAC
2 ¶108, that decision also involved the exercise of discretion for
3 which the district defendants are immune from liability. Because
4 all the actions giving rise to Annamaria's fifth claim are
5 immunized, that claim is DISMISSED WITH PREJUDICE.

6
7 c

8 California case law makes clear that defendants are not
9 entitled to immunity for their alleged failures to protect or warn.
10 See Lopez v S Cal Rapid Transit Dist, 40 Cal 3d 780, 793-95 (1985)
11 (denying immunity to public common carrier for alleged failure of
12 bus driver to protect passenger); Peterson v San Francisco
13 Community College Dist, 36 Cal 3d 799, 815 (1984) (denying
14 immunity to community college district and its agents for alleged
15 failure to warn student of known danger); Tarasoff v Regents of
16 Univ of California, 17 Cal 3d 425, 444-47 (1976) (denying
17 therapists immunity for alleged failure to warn decedent of
18 danger); Johnson, 69 Cal 2d at 793-97 (denying immunity to State of
19 California for parole officer's alleged failure to warn foster
20 family of foster child's dangerous propensities).

21 With regard to the alleged failure of individual
22 defendants adequately to train or supervise the teachers, due to
23 the lack of briefing on the issue and the apparent lack of
24 California case law addressing the question, the court declines at
25 this time to grant immunity for these alleged instances of
26 malfeasance. If at a later point in these proceedings defendants
27 show that training and supervision of teachers at Redwood entailed
28 discretion within the meaning of § 820.2, the court will grant

1 immunity as appropriate.

3

4 Defendants suggest in passing that they did not owe a
5 duty to protect Annamaria from Gerardo and Oscar. See MTD at 8-9.

6 Although "neither school districts nor their employees
7 are the insurers of the safety of their students," they do owe "a
8 duty to use the degree of care which a person of ordinary prudence,
9 charged with comparable duties, would exercise in the same
10 circumstances." Leger v Stockton Unif Sch Dist, 202 Cal App 3d
11 1448, 1459 (1988) (citing Dailey v Los Angeles Unif Sch Dist, 2 Cal
12 3d 741, 747 (1970)). In general, one owes no duty to warn of or
13 control the conduct of another. "Such a duty may arise, however,
14 if (a) a special relation exists between the actor and the third
15 person which imposes a duty upon the actor to control the third
16 person's conduct, or (b) a special relation exists between the
17 actor and the other which gives the other a right to protection."
18 Id at 1458 (quoting Davidson v City of Westminster, 32 Cal 3d 197,
19 203 (1982) (quoting Restatement (Second) of Torts § 315 (1965)))
20 (internal citations and quotations omitted).

21 "A special relationship is formed between a school
22 district and its students resulting in the imposition of an
23 affirmative duty on the school district to take all reasonable
24 steps to protect its students. This affirmative duty arises, in
25 part, based on the compulsory nature of education." Panama Buena,
26 110 Cal App 4th at 517. But this special relationship does not by
27 itself impose on defendants a duty to protect Annamaria from sexual
28 battery by Gerardo and Oscar, for "[s]tudents are not at risk

merely because they are at school." Panama Buena, 110 Cal App 4th at 519. Rather, defendants' duty to protect Annamaria from the particular harm alleged depends on whether that harm was reasonably foreseeable." Id at 518; Leger, 202 Cal App 3d at 1459.

The SAC alleges that defendants knew or should have known that Gerardo and Oscar "were engaging in similar acts in class on numerous occasions" and "were a hazard to fellow students." SAC ¶¶91-92. These allegations are sufficient to allege a duty to warn and/or protect Annamaria from Gerardo and Oscar.

Finally, contrary to defendants' contention, the SAC sufficiently alleges breach and proximate causation. See, e g, ¶¶93-95.

4

Defendants move to dismiss Annamaria's fourth, sixth, ninth and tenth claims on the ground that they are duplicative of her third claim, which the court construes as a motion to strike these claims as redundant pursuant to FRCP 12(f). Because it is readily apparent that Annamaria's ninth claim (general negligence) adds nothing to the SAC, defendants' motion to strike Annamaria's ninth claim is GRANTED. The court declines defendants' invitation to groom the pleadings any further.

E

Intentional Infliction of Emotional Distress

Annamaria's eighth claim alleges intentional infliction of emotional distress (IIED). SAC ¶127. "The elements of [IIED] are: (1) extreme and outrageous conduct by the defendant with the

1 intention of causing, or reckless disregard of the probability of
2 causing, emotional distress; (2) the plaintiff's suffering severe
3 or extreme emotional distress; and (3) actual and proximate
4 causation fo the emotional distress by the defendant's outrageous
5 conduct." Christensen v Superior Court, 54 Cal 3d 868, 903 (1991)
6 (internal quotations omitted). Further, "[i]t is not enough that
7 the conduct be intentional and outrageous. It must be conduct
8 directed at the plaintiff, or occur in the presence of a plaintiff
9 of whom the defendant is aware." Id.

10 Defendants maintain that their conduct was not extreme
11 and outrageous. "The standard set for measuring outrageous conduct
12 indicates the qualifying conduct must be so outrageous in character
13 and so extreme in degree as to go beyond all possible bounds of
14 decency and to be regarded as atrocious and utterly intolerable in
15 a civilized community." Davidson v City of Westminster, 32 Cal 3d
16 197, 209 (1982).

17 The court first notes that immunity for defendants'
18 decision to place (or recommend placing) Annamaria in the so-called
19 "special classes" extends to this claim, as does immunity for
20 Principal Daugherty's alleged failure to take adequate disciplinary
21 action. See *supra* IV(D)(2). The only remaining averments that
22 could plausibly support an IIED claim against Principal Daugherty
23 are the allegations that (1) she repeatedly telephoned Antoinette
24 to demand that Annamaria return to school, insinuating that it was
25 unlawful for Annamaria to not attend school and (2) she did not
26 allow Annamaria to attend the final school dance, telling Annamaria
27 that she was "unwelcome." SAC ¶¶54-55, 113-14.

28 //

1 Although defendants did not so argue, telephone calls to
2 Antoinette cannot give rise to an IIED claim for Annamaria because
3 the conduct was neither directed at Annamaria nor did it occur in
4 her presence, physical or telephonic. See Christensen, 54 Cal 3d
5 at 902-06; see also Ochoa v Superior Court, 39 Cal 3d 159, 165 n 5
6 (1985) (holding that parents could not state IIED claim based on
7 conduct directed at their child). In any event, it simply is not
8 beyond the realm of civil decency for a school principal sternly to
9 demand the attendance of an enrolled student.

10 With regard to the school dance, the court first notes
11 that, although the SAC does not specifically so allege, the
12 allegations suggest that Annamaria was no longer attending Redwood.
13 See SAC ¶113 (alleging that Principal Daugherty would not let
14 Annamaria attend the dance "either as an independent study student
15 of [Redwood] or as a guest of Annamaria's closest friends who
16 attended [Redwood]"). The court further notes that the parties
17 have not briefed whether the decision not to allow Annamaria attend
18 the dance was discretionary within the meaning of California
19 Government Code § 820.2. In any event, given Annamaria's young age
20 and connection with Redwood, the court cannot conclude at this
21 juncture that refusing to allow Annamaria to attend the dance and
22 telling her she was "unwelcome" could not prove to have been
23 extreme or outrageous. Whether this proves to be so will depend
24 upon the particulars of the communications between Annamaria and
25 Principal Daugherty.

26 Neither Mrs Myers' alleged conduct (sending Gerardo and
27 Oscar to Principal Daugherty's office) nor Mrs Kernberger's alleged
28 conduct (initially instructing Annamaria to ignore Gerardo and

Oscar and later sending the boys to the principal's office) is extreme and outrageous.

The SAC alleges no facts indicating that Superintendent Brown directed any action toward Annamaria, much less action that was extreme or outrageous with intent to cause emotional distress.

Annamaria's eighth claim is DISMISSED as to defendants Myers, Kernberger and Brown.

V

Motion to Strike

Defendants move to strike all claims against defendants Goldberg and Chase based on their limited involvement in the events giving rise to this action and the fact that the SAC does not pray for relief against these two defendants. Annamaria appears to concede that Goldberg and Chase are subjects of the SAC only to the extent they "were involved in making the decision to place [Annamaria] in a class that was neither appropriate for her skill level nor safe for her personal well being." Opp at 21. Because the court has concluded that Annamaria's claim for negligent placement should be dismissed, the court further concludes that all claims against defendants Goldberg and Chase should be DISMISSED.

Defendants also move to strike Annamaria's prayer for punitive damages. "It is well established that a jury may award punitive damages under section 1983 either when a defendant's conduct was driven by evil motive or intent, or when it involved a reckless or callous indifference to the constitutional rights of others." Morgan v Woessner, 997 F2d 1244, 1255 (9th Cir 1993) (quotations omitted); see also generally Dang v Cross, 422 F3d 800

1 (9th Cir 2005). Dismissal of all state law claims against NVUSD
2 moots defendants' argument that punitive damages cannot be
3 recovered against a public entity pursuant to California Government
4 Code § 818. Annamaria cites no authority for the proposition that
5 a state actor must be acting outside the scope of her employment in
6 order to be sued in her individual capacity.

7 Annamaria's motion to strike the prayer for punitive
8 damages is DENIED.

10 VII

11 In sum, defendants' motion is GRANTED IN PART and DENIED
12 IN PART as follows: Annamaria's first claim (Title IX) is
13 DISMISSED WITH PREJUDICE as to the individual defendants.
14 Annamaria's second through twelfth claims, inasmuch as they are
15 asserted against NVUSD and the individual defendants in their
16 official capacities, are jurisdictionally barred by the Eleventh
17 Amendment and are accordingly DISMISSED as to NVUSD and the
18 individual defendants in their official capacities WITHOUT
19 PREJUDICE to Annamaria's ability to assert these claims in a court
20 of competent jurisdiction. Defendant Myers is entitled to
21 qualified immunity on Annamaria's § 1983 claim; accordingly,
22 Annamaria's seventh claim against Mrs Myers is DISMISSED WITH
23 PREJUDICE. As to all individual defendants named in their
24 individual capacities, Annamaria's claim for racial discrimination
25 is DISMISSED WITH PREJUDICE; Annamaria's second, fifth and tenth
26 claims (sexual battery, negligent placement and violation of the
27 California Education Code, respectively) are DISMISSED WITH
28 PREJUDICE; and Annamaria's ninth claim (general negligence) is

1 STRICKEN as redundant. Annamaria's eighth claim is DISMISSED WITH
2 PREJUDICE as to defendants Myers, Kernberger and Brown. Finally,
3 any remaining claims against defendants Goldberg and Chase are
4 DISMISSED WITH PREJUDICE.

5 Annamaria may file an amended pleading consistent with
6 this order within thirty days of the filing of this order.

7
8 SO ORDERED.

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11 VAUGHN R WALKER

12 United States District Chief Judge
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